TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 181.

WILLIAM McKAY (SUBSTITUTED FOR MARY KALYTON) ET AL., PLAINTIFFS IN ERROR,

vs.

AGNES KALYTON, BY LOUISE KALYTON, HER GUARDIAN *AD LITEM.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED JANUARY 12, 1906.

(20,045.)

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1 *Transcript.*

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff and Appellant,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHARLES WILKINS, as United States Indian Agent, Defendants and Respondents.

Appeal from the Circuit Court of Umatilla County. Honorable W. R. Ellis, Judge.

H. J. Bean, Attorney for Plaintiff and Appellant.
T. G. Hailey, Attorney for Defendant and Respondent.

Filed Mch. 30, 1903.

J. J. MURPHY, *Clk*,
By LEE MOORHOUSE, *Deputy*.

2 Be it remembered that heretofore, on the 30th day of December, 1899, a petition was filed in the office of the Clerk of the Circuit Court, in and for the County of Umatilla, and State of Oregon, in words and figures as follows:—

In the Circuit Court of the State of Oregon for Umatilla County.

AGNES KALYTON, Plaintiff,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHARLES WILKINS, as United States Indian Agent, Defendants.

Petition.

To the Honorable Stephen A. Lowell, Judge of the above entitled Court:

The petition of Louise Kalyton respectfully represents and shows to this Honorable Court:

I.

That Agnes Kalyton is a minor, under the age of Twenty One years, to-wit: of about the age of two years, and that your petitioner is the mother of said Agnes Kalyton.

II.

That the defendant Charles Wilkins, is the duly appointed, qualified and acting United States Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That said Agnes Kalyton is the female child of Joe Kalyton, deceased, and your petitioner.

3 IV.

That on or about the 25th day of December, 1898, said Joe Kalyton, who was then a Cayuse Indian Number 246, and a member of one of the tribes of Indians residing on the Umatilla Indian Reservation in the State of Oregon, died intestate at Umatilla County, State of Oregon, seized and possessed of the following described real estate, to-wit:

Lot- six (6) and seven (7) and the North half of the Southeast quarter of section 31, in Township 3 North, of Range 34 East of the Willamette Meridian, in Umatilla County, State of Oregon, being a part of the Umatilla Indian Reservation and containing 157 acres.

V.

That said land was duly allotted to said Joe Kalyton on or about the 21st day of April, 1891, by the Government of the United States of America, under and by virtue of the provision of an act of Congress, entitled "An Act providing for the allot/ment of land in severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes"; which said Act was approved March 3rd, 1885, and the amendments thereto; that said allot/ment was duly approved by the Department of the Interior of the United States of America, on the 12th day of April, 1893.

VI.

That said Act of Congress provides that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allot/ment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that
4 at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid in fee, discharged of said trust, and free of all charge or encumbrance whatsoever. That said Act further provides: that the law of alienation and descent in force in the State of Oregon shall apply thereto after the patents have been executed.

VII.

That said Joe Kalyton, deceased, left as an heir, the said Agnes Kalyton, who is the sole heir at law of the said Joe Kalyton, deceased. And that said Joe Kalyton left no other child nor any issue of any deceased child of said Joe Kalyton deceased.

VIII.

That under the laws of the State of Oregon, and the provisions of said Act of Congress, said plaintiff Agnes Kalyton, is entitled to have all of said land of said deceased, descend to her, and is entitled to have the immediate possession and the present rents, issues and profits thereof.

XI.

That the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net wrongfully, fraudulently and without any right whatever, claim to be the heirs of said Joe Kalyton, deceased, and claim to be the owners of and entitled to the possession of said land, and have ever since the death of the said Joe Kalyton, wrongfully, unlawfully and fraudulently, held and retained possession of said land, and have prevented said plaintiff, Agnes Kalyton, from taking possession thereof, and from collecting the rents of said land, or having any benefit therefrom.

5

X.

That the present rental value of said land is $1.75 per acre, per annum, and of the aggregate value of $274.75 per annum.

XI.

That all of the above named defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, and Al-on-ta-mop-net are Indians, residing upon said Umatilla Indian Reservation, and have no property with which to satisfy any judgment or claim against them, or either of them, and that each of said last named defendants is insolvent.

XII.

That said last named defendants threaten to and will, unless restrained by this Honorable Court, prevent and hinder the plaintiff, Agnes Kalyton, from taking possession of said land and from renting the same, and from collecting the rents or having any use or benefit from said land, or cultivating the same and that said last named defendant, acting together with said John R. Glasscock, and by and through said Charles Wilkins, the United States Indian Agent, as aforesaid, will use and lease said land, and collect the rents, issues and profits thereof, and that said plaintiff Agnes Kalyton, will be thereby irreparably injured and defrauded of her just rights in the premises.

XIII.

That under the rules and regulations of the Department of the Interior of the United States of America, before the plaintiff can obtain any benefit, or the rents or profits from said land, or establish any right thereto, it is necessary that it be declared by a

Court of competent jurisdiction under the laws of the State of Oregon, who the legal heirs of said deceased *is*.

6 XIV.

That patent for said land has been duly issued by the Government of the United States to said Joe Kalyton, deceased.

XV.

That plaintiff has no plain speedy or adequate remedy at law.

Wherefore, your petitioner prays that your petitioner be appointed by this Honorable Court as Guardian *ad-litem* for said minor, Agnes Kalyton, to appear for, and commence and prosecute to a final determination, a suit against the above named defendants, in this Honorable Court, and in order to establish and protect the rights of said minor plaintiff, and to obtain and establish the rights of the said Agnes Kalyton to said land.

H. J. BEAN,
Attorney for Petitioner.

STATE OF OREGON, *County of Umatilla, ss:*

I, Louise Kalyton, being first duly sworn, say: I am the petitioner above named, and that the foregoing petition is true as I verily believe.

her
LOUISE x KALYTON.
mark.

Subscribed and sworn to before me this 30th day of December 1899.

J. H. LAWREY,
[SEAL.] *Notary Public for Oregon.*

And afterwards, on the 30th day of December, 1899, there was filed in the office of the Clerk of said Court, an order in words and figures as follows:

7 In the Circuit Court of the State of Oregon for Umatilla County.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *Ad Litem*, Plaintiff,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, Mrs. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHARLES WILKINS, as United States Indian Agent, Defendants.

Order.

It duly appearing to the Court from the verified petition of Louise Kalyton, on file herein, as follows:—

I.

That Agnes Kalyton is a minor, under the age of twenty-one years, to-wit: of about the age of two years, and that your petitioner is the mother of said Agnes Kalyton.

II.

That the defendant, Charles Wilkins, is the duly appointed, qualified and acting United States Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That said Agnes Kalyton is the female child of Joe Kalyton deceased, and your petitioner.

IV.

That on or about the 25th day of December, 1898, said Joe Kalyton, who was then a Cayuse Indian, Number 246, and a member of one of the tribes of Indians residing on the Umatilla Indian Reservation in the State of Oregon, died intestate at Umatilla County, State of Oregon, seized and possessed of the following described real estate, to-wit:

8 Lot six (6) and seven (7) and the North half of the Southeast quarter of section 31, in Township 3 North, of Range 34 East of the Willamette Meridian in Umatilla County, State of Oregon, being a part of the Umatilla Indian Reservation, and containing 157 acres.

V.

That said land was duly allotted to said Joe Kalyton on or about the 21st day of April, 1891, by the Government of the United States of America, under and by virtue of the provision of an Act of Congress, entitled "An Act providing for the Allotment of land in Severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes;" which said Act was approved March 3d 1885, and the amendments thereto; that said allotment was duly approved by the Department of the Interior of the United States of America on the 12th day of April 1893.

VI.

That said Act of Congress provides that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust, and free of all charge or encumbrance whatsoever, that said Act further provides, that the law of alienation and descent in

force in the State of Oregon shall apply thereto after the patents have been executed.

9

VII.

That said Joe Kalyton, deceased, left as an heir, the said Agnes Kalyfon, who is the sole heir at law of the said Joe Kalyton, deceased, and that said Joe Kalyton, deceased, left no other child or the issue of any deceased child of said Joe Kalyton, nor any other heir.

VIII.

That under the laws of the State of Oregon, and the provisions of said Act of Congress, said plaintiff, Agnes Kalyton, is entitled to have all of said land of said deceased, descend to her, and is entitled to have the immediate possession and the present rents, issues and profits thereof.

IX.

That the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and At-on-ta-mop-net wrongfully, fraudulently and without any right whatever, claim to be the heirs of said Joe Kalyton, deceased, and claim to be the owners of and entitled to the possession of said land, and have, ever since the death of the said Joe Kalyton, wrongfully, unlawfully and fraudulently, held and retained possession of said land, and have prevented said plaintiff, Agnes Kalyton, from taking possession thereof, or from collecting the rents of said land, or having any benefit therefrom.

X.

That the present rental value of said land is $1.75 per acre, per annum, and of the aggregate value of $274.75 per annum.

XI.

That all of the above named defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and At-on-ta-mop-net are Indians, residing upon said Umatille Indian Reservation,

10 and have no property with which to satisfy any judgment or claim against them, or either of them, and that each of said last named defendants is insolvent.

XII.

That said last named defendants threat to and will, unless restrained by this Honorable Court, preven and hinder the plaintiff, Agnes Kalyton, from taking possession of said land, and from renting the same, and from collecting the rents or having any use or benefit from said land, or cultivating the same, and that said last named defendant acting together with said John R. Glasscock and by and through said Charles Wilkins, the United States Indian Agent, as aforesaid, will use and lease said land, and collect the rents, issues and profits thereof, and that said plaintiff Agnes Kalyton, will

be thereby irreparably injured and defrauded of her just rights in the premises.

XIII.

That under the rules and regulations of the Department of the Interior of the United States of America, before the plaintiff can obtain the benefit or the rents or profits from said land, or establish any rights thereto, it is necessary that it be declared by a Court of competent jurisdiction under the laws of the State of Oregon, who the legal heir of the said deceased is.

XIV.

That patent for said land has been duly issued by the Government of the United States to said Joe Kalyton, deceased.

XV.

That plaintiff has no plain, speedy or adequate remedy at law.

Now therefore, on motion of H. J. Bean, attorney for said plaintiff and petitioner, it is hereby ordered by the Court that said
11 Louise Kalyton be, and she is hereby appointed as Guardian *ad litem* for said minor, Agnes Kalyton, to commence, appear for and prosecute to a final determination a suit against the above named defendants, on behalf of said plaintiff Agnes Kalyton, in this Court, for the purpose of establishing the rights of said minor plaintiff, to the above described land, and in order that the said plaintiff, Agnes Kalyton may be declared to be the heir at law of Joe Kalyton, deceased, and entitled to the immediate possession, and to the present use, rents, issues and profits of said land.

Done and dated at Pendleton, Oregon, this 30th day of December 1899.

STEPHEN A. LOWELL,
Circuit Judge.

And afterwards on the 30th day of December 1899, there was filed in the office of the Clerk of said Court, an oath of guardian *ad litem*, in words and figures as follows:—

(Title of Court and Cause.)

STATE OF OREGON, *County of Umatilla, ss:*

I, Louise Kalyton, being first duly sworn, says: I am the duly appointed Guardian *Ad Litem* of Agnes Kalyton, in the above entitled suit; that I will support the Constitution of the United States, and the Constitution of the State of Oregon and that I will faithfully discharge the duties of said Guardian *ad litem* in the above entitled suit to the best of my ability; So help me God.

her
LOUISE x KALYTON.
mark

12 Subscribed and sworn to before me this 30th day of December 1899.

[SEAL.] J. H. LAWREY,
Notary Public for Oregon.

And afterwards, on the 30th day of February 1899, there was filed in the office of the Clerk of said Court, a complaint in words and figures as follows:—

(Title of Court and Cause.)

The plaintiff above named for cause of suit against the above named defendants, by Louise Kalyton, her guardian *ad litem,* complains and alleges as follows:—

I.

That plaintiff, Agnes Kalyton, is a minor, under the age of twenty-one years, to-wit: of about the age of two years, and that Louise Kalyton, is the duly appointed, qualified and acting guardian *ad litem* for said Agnes Kalyton in this suit, duly appointed by the above entitled Court.

II.

That the defendant, Charles Wilkins is the duly appointed, qualified and acting United States Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That said Agnes Kalyton is the female child of Joe Kalyton, deceased, and Louise Kalyton. That said Louise Kalyton is and was at all the dates and times herein mentioned, an Indian woman and a member of the Cayuse tribe of Indians, residing on said Umatilla Indian Reservation.

That said Joe Kalyton, deceased was at all the dates and times herein mentioned, until the time of his death a male Indian
13 and a member of the Cayuse tribe of Indians, Number 246, residing on the said Umatilla Indian Reservation.

IV.

That on or about the year 1893, said Louise Kalyton, and Joe Kalyton were duly married in accordance with the customs and laws of said tribe of Indians, at said Umatilla Indian Reservation, and thereafter lived and cohabited together as husband and wife, according to the custom and manner of Indian life, for a period of about five years, and that said Agnes Kalyton is the issue of said marriage and cohabitation.

That on or about the — day of —— 1898, said Joe Kalyton died intestate at Umatilla County, State of Oregon, seized and possessed of the following described real estate, to wit: Lots six (6) and seven (7), and the North half of the Southeast quarter of section 31,

in Township 3 North of Range 34 East of the Willamette Meridian, in Umatilla County State of Oregon, being a part of the Umatilla Indian Reservation, and containing 157 acres.

V.

That said land was duly allotted to the said Joe Kalyton on or about the 21st day of April 1891, by the Government of the United States of America, under and by virtue of the provisions of an Act of Congress, entitled An Act providing for the Allotment of land in Severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes;" which said Act was approved March 3rd, 1885, and the amendments thereto; that said allotment was duly approved by the Department of the Interior of the United States of America on the 12th day of April 1893.

14 VI.

That said Act of Congress provides that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever. That said Act further provides that the law of alienation and descent in force in the State of Oregon shall apply thereto after the patents have been executed.

VII.

That said Joe Kalyton, deceased, left as an heir, the said plaintiff, Agnes Kalyton, and that said Joe Kalyton left no other child or heir and that said plaintiff Agnes Kalyton, is the sole heir at law of the said Joe Kalyton deceased.

VIII.

That under the laws of the State of Oregon, and the provisions of said Act of Congress, said plaintiff, Agnes Kalyton, is entitled to have all of said land of said deceased, descend to her, and is entitled to have the immediate possession, and the present use and the rents, issues and profits thereof.

IX.

That the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, and Al-on-ta-mop-net wrongfully, fraudulently and without any right whatever, claim to be the heirs of said Joe Kalyton, deceased, and claim to be the owners of, and entitled to the possession of said land and have, ever since the death of the

said Joe Kalyton, wrongfully, unlawfully and fraudulently
15 held and retained possession of said land, and have used and occupied the same, and collected and used the rents, issues and profits thereof, and have prevented said plaintiff, Agnes Kalyton from taking possession thereof, or from collecting the rents from said land or having any benefit therefrom.

X.

That the present rental value of said land is $1.75 per acre per annum, and of the aggregate value of $274.75 per annum.

XI.

That all of the above named defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net are Indians, residing upon said Umatilla Indian Reservation, and have no property subject to sale upon execution, whereby any judgment against them, or either of them, might be satisfied, and that each of said last named defendants are insolvent.

XII.

That said last named defendant threaten to and will, unless restrained by this Honorable Court, prevent and hinder the plaintiff Agnes Kalyton, from taking possession of said land, and from renting the same, and from collecting the rents, or having any use or benefit from said land or cultivating the same, and that said last named defendants acting together with *with* said John R. Glasscock, and by and through said Charles Wilkins, United States Indian Agent, as aforesaid, will use and lease said land and collect the rents, issues and profits thereof, and that said plaintiff Agnes Kalyton will be thereby irreparably injured and defrauded of her just rights in the premises, and prevented from obtaining any use, rent, issues or profits from said land.

16 XIII.

That under the rules and regulations of the Department of the Interior of the United States of America, before the plaintiff can obtain any benefit or the rents or profits from said land, or establish any right thereto, it is necessary that it be declared by a court of competent jurisdiction under the laws of the State of Oregon, who the legal heir of said deceased is.

XIV.

That the defendant John R. Glasscock, has or claims to have some interest in or claim upon said land, the exact nature of which is to the plaintiff unknown; but that the same is fraudulent and void as against this plaintiff.

XV.

That plaintiff has no plain speedy or adequate remedy at law.

Wherefore, plaintiff prays for a decree of this Honorable Court; that plaintiff Agnes Kalyton, be declared to be the sole heir at law of said Joe Kalyton, deceased, and the owner of and entitled to the immediate possession of all the land of said deceased above described.

That the defendants Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net be declared to have no right, title or interest in or to said described land or any part thereof, or to the use, rents and profits thereof.

That each and all of the defendants be enjoined and inhibited from in any manner interfering with plaintiff in the exercise of her right to said land, and that each of said defendants their servants or agents, and all persons acting by, under or through them or either of them, be enjoined and inhibited from taking possession of
17 said land, or any part thereof, or in any way interfering with plaintiff's possession and use of said land.

And that each of said defendants be restrained and inhibited from leasing said land, or collecting the rents, issues or profits thereof until the final determination of this suit, and that upon the final determination of this suit, *and that upon the final determination of this suit*, said order and injunction be made perpetual: That plaintiff may have judgment for her costs and disbursements in this suit.

That plaintiff may have such other and further relief as to this Honorable Court may seem meet and equitable in the premises:

And plaintiff as in duty bound will ever pray.

H. J. BEAN,
Attorney for Plaintiff.

STATE OF OREGON, *County of Umatilla, ss:*

I, Louise Kalyton, being first duly sworn say: I am the duly appointed Guardian *ad litem* for the above named plaintiff, Agnes Kalyton, in this suit, and that the foregoing complaint is true, as I verily believe.

her
LOUISE x KALYTON.
mark.

Subscribed and sworn to before me this 30th day of December 1899.

J. H. LAWREY,
[SEAL.] *Notary Public for Oregon.*

And afterwards, on the 5th day of February 1900, there was filed in the office of the Clerk of said Court, a summons in words and figures as follows:—

18 (Title Court and Cause).

To Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Katon, Al-on-ta-mop-net, John R. Glascock and Charles Wilkins as United States Indian Agent, defendants.

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above entitled suit, within ten days from the date of the service of this summons upon you, if served in Umatilla County; or if served in any other County in the State of Oregon, then within twenty days from the date of such service upon you.

And you will take notice that if you fail to appear and answer or plead within said time, plaintiff, for want thereof, will apply to the Court for the relief prayed for in the complaint filed herein, to-wit: That plaintiff be declared to be the sole heir at law of Joe Kalyton, deceased, and entitled to all of the land of said deceased; that each of said defendants be declared to have no right, title or interest in or to said land, or any part thereof, and that they each be restrained from in any manner interfering with plaintiffs' use, and occupation of said land, and for plaintiffs costs and disbursements of this suit.

H. J. BEAN,
Attorney for Plaintiff.

STATE OF OREGON, *Umatilla County, ss:*

To the Sheriff of Umatilla County, Oregon:

You are hereby directed to serve a copy of the complaint in the within entitled suit with a summons in the said suit upon the defendants, Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-to-mop-net only; and to serve summons only without copy of complaint in said suit upon each of the
19 other defendants.

H. J. BEAN,
Attorney for Plaintiff.

Dated this 30th day of December, 1899.

(Endorsed as follows:)

STATE OF OREGON, *County of Umatilla, ss:*

I, W. M. Blakely, Sheriff of Umatilla County, State of Oregon, do hereby certify that I served the annexed summons, within said county and State, on the 27th day of January, 1900, on the within named defendants Mary Kalyton, Pete Kalyton, Little Pete Kalyton, and Al-on-ta-mop-net, by delivering to said Mary Kalyton, Pete Kalyton, Little Pete Kalyton and Al-on-ta-mop-net each personally and in person, a true copy thereof, duly certified to be such copy by me as Sheriff, together with a copy of the Complaint in the within cause, certified to be such copy by H. J. Bean, plaintiff's attorney

that I further served the said Summons within said County and State, on the 3d day of February, 1900, on the within named defendant, Mrs. Ida Caton by delivering to said Mrs. Ida Caton, personally and in person, a true copy thereof, duly certified to be such copy by me as Sheriff, together with a copy of the Complaint in the within cause, duly certified to be such copy by H. J. Bean, Plaintiff's Attorney; that I further served the said summons within said County and State on the 12th day of January, 1900, on the within named defendant John R. Glascock by delivering to said John R. Glascock personally and in person a true copy thereof, duly certified to by me as Sheriff; that I further served the said Summons within said County and State on the 30th day of January, 1900, on the within named defendant Charles Wilkins as United States Indian
20 Agent by delivering to said Charles Wilkins as United States Indian Agent, personally and in person a true copy thereof, duly certified to be such copy by me as Sheriff.

W. M. BLAKELY, *Sheriff.*

And afterwards on the 6th day of February, 1900, there was filed in the office of the Clerk of said Court, a demurrer in words and figures as follows:

(Title Court and Cause.)

Comes now all of the above named defendants except the defendant Charles Wilkins as Indian Agent and Demur to the Complaint filed herein for the reason that the same does not state facts sufficient to constitute a cause of suit against these defendants or either of them and for the further reason that the Court has no jurisdiction of the subject matter of this suit.

T. G. HAILEY,
Attorney for the Defendants.

(Endorsed as follows:)

STATE OF OREGON, *County of Umatilla, ss:*

Service by copy of the within demurrer is hereby accepted within Umatilla County, Oregon, this 5th day of February 1900, and all other and further service waived.

H. J. BEAN,
Attorney for Plaintiff.

And afterwards on the 18th day of September 1900, the same being the 31st judicial day of the June term of said Court,
21 Journal entry was made on said Demurrer, in words and figures as follows:

(Title Court and Cause.)

On this day this cause coming on to be heard upon the demurrer of the defendants, filed herein, plaintiffs appearing — H. J. Bean their attorney, and defendants by T. G. Hailey their attorney, and

the Court having heard the usual argument of said attorneys, by agreement it is hereby ordered that this cause be and the same is hereby taken under advisement and said Attorneys are to furnish written briefs herein.

(Sig.) W. R. ELLIS,
Circuit Judge.

And afterwards on the 2nd day of April 1901, the same being the 30th Judicial day of the January term of said Court, an order was made overruling said demurrer, in words and figures as follows.

(Title Court and Cause.)

On this day this cause coming on for decision upon the demurrer of the defendants heretofore filed herein, the same having been heretofore argued by counsel, for the respective parties and submitted to the Court; and the Court having fully considered the same the plaintiff appearing at this time by H. J. Bean, her attorney, and the defendants by T. G. Hailey, their attorney.

It is hereby ordered, that the said demurrer be and the same is hereby overruled as to the question of jurisdiction, and is
22 sustained as to the question of the sufficiency of the facts stated in the Complaint to constitute a cause of suit, and

It is further ordered, that plaintiff have one day in which to further plead herein.

(Sig.) W. R. ELLIS,
Circuit Judge.

And afterwards, on the 9th day of April, 1901, there was filed in the office of the Clerk of said —, a motion in words and figures as follows:

(Title Court and Cause.)

Comes now the above named plaintiff, by Louis- Kalyton her Guardian *ad litem*, by H. J. Bean, her attorney, and moves the Court for a rehearing, and reconsideration of the decision of this honorable Court, upon the demurrer of defendants to plaintiff's complaint rendered herein, for the following reasons.

That the Court held and decided that the alleged marriage of Joe Kalyton and Louise Kalyton, the father and mother of plaintiff was illegal, for the reason that said Indians had been allotted land, under the provisions of the act of Congress March 3, 1885.

And that the Complaint and record does not show, that said Louise Kalyton, has been allotted any land.

That this Honorable Court held, that said Joseph Kalyton and Louise Kalyton, were subject to the laws of the State of Oregon, in the matter of marriage, under the provisions of the Act of Congress of February 8, 1887, and therein erred as the Supreme Court of the State of Oregon, in the case of McBean *v.* McBean, 61 Pac.
23 Rep. page 422 has held that "While the act of 1897 was general in its purpose, it seems there was no intention of ex-

nding its provisions, to the Umatilla Reservation, and the Indians concerned," and in effect that said Act of Congress of 1887, does not apply to the Umatilla Reservation or to the Indians thereon.

In support of the first contention we beg to submit that the marriage between an Indian man and an Indian woman while sustaining their tribal relations, in accordance with the customs and laws of such Indian Tribes would be valid, and is recognized by all of the Courts in the United States, both State and Federal.

Nelson on Marriage and Divorce, Vol. 1, sec. 34.
Earl *v.* Godley, 42 Minn. 361.
Compo *v.* Jackson Iron Co., 76 Mich. 585.
Kobogum *v.* Jackson Iron Co., 76 Mich. 498.
Johnson *v.* Johnson, 30 Mo. 72; 77 Am. Dec. 598.
Boyer *v.* Diveley, 58 Mo. 510.
La Riviere *v.* La Rivere 77 Mo. 517.

That a marriage between a white person and an Indian is governed by the same law as that between Indians.

McBean *v.* McBean, 56 Pac. Rep. 418.
Bishop on Marriage and Divorce Vol. 1 Sec. 306.
Nelson on Marriage and Divorce, Vol. 1, sec. 34.

hence although the husband Joe Kalyton, may under the law be a Citizen of the United States, and even a white person, his marriage with Louise Kalyton, who as it is alleged in the Complaint, "Is and was at all the dates and times herein mentioned, and Indian woman, and a member of the Cayuse tribe of Indians, residing on said Umatilla Indian Reservation," in accordance with the Customs and Laws of the said tribe of Indians, would be valid, and the issue of such marriage would be legitimate, and even though the
24 father might be a citizen of the United States. This point having been practically overlooked, in the argument of this cause upon demurrer, we respectfully ask for a rehearing especially upon this point.

H. J. BEAN,
Attorney for Plaintiff.

Endorsed.

STATE OF OREGON, *County of Umatilla, ss:*

Service by copy, of the within motion, is hereby admitted within —— County, and State of Oregon, this 9th day of April, A. D. 1901, and all further and other service is hereby waived.

T. G. HAILEY,
Att'y for Pl'ff.

And afterwards, on the 12th day of April 1901, there was filed in the office of the Clerk of said Court, an answer in words and figures as follows:—

(Title Court and Cause.)

Comes now the defendant Mary Kalyton, and makes the following separate answer to the complaint filed herein:

1.

Denies that said Agnes Kalyton is the female child of Joe Kalyton, deceased, and Louise Kalyton; admits that said Louise Kalyton is, and was, at all the times and dates mentioned in said complaint, an Indian woman, and that prior to the allotment of the lands mentioned in said complaint she was a member of the Cayuse tribe of Indians, residing upon said Umatilla Indian Reservation; and admits that Joe Kalyton, deceased, was prior to the time of the allotment of lands mentioned in said complaint an Indian and a member of the Cayuse tribe of Indians residing upon said Reservation.

2.

Denies that on or about the year 1893, or at any other time said Louise Kalyton and Joe Kalyton, were duly or otherwise married in accordance with the customs or laws of said tribe of Indians, or at all, at said Umatilla Reservation or elsewhere, or thereafter or at all lived or cohabited together as husband and wife according to the custom or manner of Indian life or at all, for a period of about five years or at any time and denies that said Agnes Kalyton is the issue of said marriage or cohabitation; admits that said Joe Kalyton died intestate in Umatilla County State of Oregon, about the year 1898, seized and possessed of the lands described in the complaint, which were allotted to him as set out in paragraph five of the complaint herein.

3.

Denies that the said Joe Kalyton left as an heir the said Agnes Kalyton, plaintiff herein; and denies that said Agnes Kalyton is the sole or any heir at law or otherwise of said Joe Kalyton; and denies that said Joe Kalyton left no other heir.

4.

Denies that, under the laws of the State of Oregon, or the provisions of said Act of Congress, said Agnes Kalyton is entitled to have all or any of the said lands of deceased descend to her, or is entitled to have immediate or any possession, or the present or any use, or rents, issues, or profits thereof or of any part thereof; denies that this defendant Mary Kalyton, wrongfully fraudulently or without any claim whatever, claims to be the heir of said Joe Kalyton deceased; and admits that she claims to be the owner, and entitled to the possession of said lands; but denies that she has ever since his death, wrongfully, unlawfully, held or retained possession of said lands; and admits that she has used and occupied the same and collected and used the rents issues and profits thereof, and has prevented said Agnes Kalyton from taking pos-

session thereof or from collecting the rents of said lands or having any benefit therefrom; and denies that said other defendants have or claim any right in or to said lands, or any part thereof.

5.

Admits that this defendant will prevent and hinder the plaintiff Agnes Kalyton, from taking possession of said lands and from renting the same, and from collecting the rents or having any use or benefits from said lands or cultivating the same; but denies that this defendant is in anywise acting in connection with said John R. Glascock, or that said John R. Glascock claims any interest in said lands, or by or through said defendant Wilkins, this defendant will use or lease said lands; and denies that said Agnes Kalyton will thereby, or otherwise, be irreparably or otherwise injured or defrauded of her just or any rights, or prevented from obtaining any use, rents, issues, or profits of said lands.

6.

Denies that John R. Glascock has or claims to have any interest in or claim upon said lands or any part thereof.

7.

Denies that plaintiff has no plain, speedy, or adequate remedy at law.

And further answering said complaint this defendant alleges.

27 1.

That at the time said alleged marriage is alleged to have occurred, and for a long time prior and subsequent thereto, said Joe Kalyton deceased, and said Louise Kalyton were Indians to whom separate allotments had been made of land upon the Umatilla Indian Reservation in Oregon, under the provisions of an Act of Congress entitled, "An Act providing for the allotment of land in severalty, to the Indians residing upon the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes," Approved March 3d 1885, and were born within the territorial limits of the United States.

2.

That said allottments were made to said Joe Kalyton and said Louise Kalyton, the latter under the name of Louise, on or about April 21st 1891, and said allottees, immediately accepted the same, entered upon, and took possession thereof, and said Joe Kalyton continued in possession of his allotment from such time, until about the year 189- when he died, and said Louise, ever since said allotment has been and now is in possession of her allotment.

3.

That said Joe Kalyton is Allottee No. 246 on the list of Cayuse Indians Allotted on said Reservation and said Louise is No. 217 on said list.

4.

That said alleged marriage, if any, was performed after said allotments had been made and accepted by said Joe Kalyton and said Louise as aforesaid, and was not in accordance with the laws of the State of Oregon in force at said time, but, if at all, was in accordance with the laws and customs of said Cayuse tribe of Indians,
28 and not otherwise, and was, and is, therefore, void.

And further answering said complaint, and as a cross-complaint herein, this defendant alleges:

1.

That on or about April 21st 1891, Joe Kalyton was residing upon the Umatilla Indian Reservation in Umatilla County, Oregon, and was a member of the Cayuse tribe of Indians residing upon said Reservation.

2.

That under the provisions of an act of Congress, entitled, "An Act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla reservation, in the State of — and granting patents therefor, and for other purposes," approved March 3d 1885, the following described lands were allotted to said Joe Kalyton, to-wit: Lots 6 and 7, and the North half of the Southeast quarter of Section 31 in ownship 3 North of Range 34 E. W. M. in Umatilla County State of Oregon containing 157 acres which said Allotment was accepted by said Joe Kalyton, and he immediately entered upon and took possession thereof, and continued in possession thereof and the use and enjoyment of the rents and profits thereof until the —— day of —— 189—, when he died.

3.

That at the time of his death he was a resident and citizen of the State of Oregon, and died unmarried, and without any lineal descendants, leaving surviving him, as the sole and only heir at law, this defendant, who is his sister.

4.

That the plaintiff herein claims to have some right, title or interest in or to the lands hereinbefore described, and a right to the
29 use and enjoyment of the present rents, issues, and profits thereof, but has no interest whatsoever in or to said lands, or to the rents, issues or profits thereof, or any part thereof; that this defendant is entitled to possession of said lands, and to the use and enjoyment of all rents, issues, and profits thereof, and that said plaintiff threatens to, and will, unless restrained by an order of this Court, enter upon and take possession of said lands, and collect the rents, issues, and profits thereof to the irreparable damage of this defendant.

Wherefore, having fully answered said complaint, defendant prays that a decree may be entered herein declaring her to be the sole and only heir at law of said Joe Kalyton deceased, and as such, the owner of and entitled to the possession of all of the lands described in her said answer herein as having been allotted to said Joe Kalyton, and

to the use of all rents, issues, and profits thereof, and perpetually enjoining said plaintiff, or any one claiming by, through, under or from her, from in any wise interfering with said lands or the possession thereof, or any part thereof, or the rents, issues, and profits arising therefrom and declaring that said plaintiff has no right, title or interest in, or to said lands, or any part thereof, and for such other and further relief herein as to the Court may seem meet and equitable.

T. G. HAILEY,
Attorney for the Defendant, Mary Kalyton.

STATE OF OREGON, *Umatilla County, ss:*

I Mary Kalyton, being first sworn, say that I am the defendant named in the foregoing answer, know the contents thereof, and the same is true.

30 —— ——.

Subscribed and sworn to before me this —— day of April 1901.

——— ———,
Notary Public for Oregon.

STATE OF OREGON, *Umatilla County, ss:*

Service by copy of the within answer is hereby accepted within Umatilla County, Oregon, this 11th day of April 1901 and all other and further service waived.

——— ———,
Attorney for pl'ff.

And afterwards, on the 12th day of April 1901, there was filed in the office of the Clerk of said court a demurrer to answer in words and figures as follows:

(Title of Court and Cause.)

Comes now the above named plaintiff by H. J. Bean, her attorney, and demurs to the new matter contained in the separate answer of defendant, Mary Kalyton, for the reason that said answer does not state facts sufficient to constitute a defense to plaintiff's complaint or any part thereof.

Plaintiff Demurs to the further answer and cross complaint of said defendant, Mary Kalyton, for the reason that the same does not state facts sufficient to constitute a defense to plaintiff's complaint or a cause of suit or for equitable relief or any part thereof.

H. J. BEAN,
Attorney for Plaintiff.

And afterwards, on the 12th day of April, 1901, there was filed in the office of the Clerk of said Court a disclaimer in words and

31 figures as follows:

(Title Court and Cause.)

Come now the defendants, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton and Al-on-ta-mop-net and disclaim any claim or interest in or to the lands mentioned in the complaint filed herein or in or to any part thereof, and say that they never had, and have not and never claimed to have had any right title or interest in or to any of the lands mentioned in the complaint herein and do not claim and none of them claims to be the heir at law or otherwise of said Joe Kalyton, and ask that this suit be dismissed as to them and each of them with costs against the plaintiff.

T. G. HAILEY,
Attorney for the Defendants Above Named.

STATE OF OREGON, *Umatilla County, ss:*

We, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, and Al-on-ta-mop-net, being first duly sworn do say each for himself and herself, that I am one of the defendants above named and know the contents of the foregoing answer and the same is true.

his
PETE x KALYTON.
mark.

his
LITTLE PETE x KALYTON.
mark.

her
MRS. IDA x CATON.
mark.

his
AL-ON- x TA-MOP-NET.
mark.

Subscribed and sworn to before me this 5th day of Feb. 1900.

T. G. HAILEY,
Notary Public for Oregon.

And afterwards, on the 10th day of February, 1902, there was filed in the office of the Clerk of said Court, a Reply was filed in words and figures and figures as follows:—

32 (Title Court and Cause.)

Comes now the above named plaintiff, Agnes Kalyton, by Louise Kalyton, her duly appointed, qualified and acting Guardian *ad litem*, in this suit, and for reply to the new matter contained in the separate answer of defendants, Mary Kalyton, filed herein denies and avers as follows:—

I.

Denies that the marriage alleged in plaintiff's complaint was in accordance with the laws of the State of Oregon in force at said time, or was or is, in any manner void.

II.

Denies that at the time of the death of Joe Kalyton, a citizen of the State of Oregon, or died unmarried, or without any lineal de-

scendants, or leaving surviving him as the sole or only, or any heir, at law, or otherwise, this defendant, either who is his sister or otherwise.

III.

Denies that plaintiff has no interest in or to said lands, or the rents, issues or profits thereof, or any part thereof, but avers that plaintiff is entitled thereto as in plaintiff's complaint alleged; Denies that this defendant is entitled to the possession of said lands, or any part thereof, or to the use or enjoyment of all or any rents, or issues or profits thereof, or any part thereof, admits that plaintiff will, unless restrained by and order of this Court, enter upon and take possession of said lands, collect the rents, issues and profits thereof; but denies that the same will be irreparably, or any damage, to this defendant, or in any manner except rightfully.

Wherefore plaintiff prays for a decree as in her complaint.

H. J. BEAN,
Attorney for Plaintiff.

33 STATE OF OREGON, *County of Umatilla, ss:*

Due service of the within reply is hereby admitted and accepted and a copy thereof received at Pendleton, Umatilla County, Oregon, this 10th day of February, A. D. 1902.

T. G. HAILEY,
Attorney for Defendant Mary Kalyton.

And afterwards, on the 14th day of July, 1902, there was filed in the office of the Clerk of said Court, as findings of fact and conclusions of law in words and figures as follows:—

(Title Court and Cause.)

I.

That plaintiff Agnes Kalyton, is a minor under the age of twenty-one years, to-wit: of about the age of two years at the beginning of this suit; and that Louise Kalyton is the duly appointed, qualified and acting guardian *ad litem* of said Agnes Kalyton in this suit, appointed by the above entitled Court.

II.

That defendant Charles Wilkins, is the duly appointed qualified and acting Indian Agent at the Umatilla Indian Reservation, in Oregon.

III.

That on or about the — day of January, 1898, Joe Kalyton died intestate in Umatilla County, State of Oregon, seized and possessed of the following described real estate to-wit; Lot six (6) and seven (7) and the North half (½) of the Southeast quarter (¼) of Sec-

tion Thirty-one (31) North of Range Thirty-four (34) E. W. M. in Umatilla County, State of Oregon, being a part of the
34 Umatilla Indian reservation, and containing One hundred and fifty-seven (157) acres which lands were duly allotted to Joe Kalyton on or about the 21st day of April, 1891, by the Government of the United States of America under and by virtue of the provisions of an act of Congress entitled "An Act providing for the allottment of land in severalty to the Indians residing on the Umatilla Indian Reservation in the State of Oregon, and granting patents therefor, and for other purposes," which said Act was approved March 3rd, 1885, and the amendments thereto which said allottments were duly approved by the Department of the Interior of the United States of America, on the 21st day of April, 1893.

IV.

That said Act of Congress provides that the United States does, and will, hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allottment shall have been made; or in case of his decease, of his heirs according to the laws of the State of Oregon; and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharge of said trust, and free of all charge or incumbrance, whatsoever; and further provides that the law of alienation and descent in force in the State of Oregon, shall apply thereto after the patents have been executed.

V.

That said Louise Kalyton, guardian *ad litem* of said plaintiff herein, Agnes Kalyton, is the mother of said Agnes Kalyton, and that during the year 1893 and after said lands had been allotted to said Joe Kalyton, as aforesaid, he began to live with said Louise Kalyton, and they continued to live together, but no mar-
35 riage ceremony was ever performed making them husband and wife, and no marriage license was ever procured by them, and they continued to live together within Umatilla County, State of Oregon, without any marriage ceremony having been performed for them until some weeks prior to the death of said Joe Kalyton, when they separated and were not living together at the time of his death, and had not been living together for some weeks prior thereto; and that said Louise Kalyton, prior to living with said Joe Kalyton had lived with one White Wolf, and at various times prior to that had lived with three other Indians as their wife and had never been divorced from any of said Indians by any Court, but had merely separated from them.

VI.

That at the time the said Joe Kalyton and Louise Kalyton began to live together, and for a long time prior and subsequent thereto, they were both Indians to whom allotments had been made of land

upon the Umatilla Indian Reservation, under the Act of Congress hereinbefore mentioned, and were born within the territorial limits of the United States, and each accepted their allotments, and entered upon and *taken* possession thereof, and said Joe Kalyton continued in possession of his allotment from the time it was allotted to him in the year 1891, until he died in January 1898; and that said Louise Kalyton has been in possession of her allotment ever since it was allotted to her in the year 1891, and is now in possession thereof; and that the living together by said Joe Kalyton and Louise Kalyton, as hereinbefore set out in the marriage claimed by the plaintiff in her complaint herein, but that said marriage was not in accordance with the laws of the State of Oregon in force at the time said parties began to live together, or since; that at the time of his death said Joe Kalyton was a resident and citizen of the State of Oregon and died unmarried and without any lineal de-
36 scendants, and left surviving him as his sole and only heir at law, the defendant Mary Kalyton, who is his sister; and that each and all of the other defendants herein, except the defendant Charles Wilkins, as United States Indian Agent, has filed a disclaimer herein of any interest whatever in said lands.

VII.

That said plaintiff Agnes Kalyton, was born in the latter part of the year 1898, and is the illegitimate child of said Joe Kalyton deceased, and has no right, title, or interest in or to the lands allotted to said Joe Kalyton.

VIII.

That plaintiff will, unless restrained by an order of this Court enter upon and take possession of said lands and collect the rents, issues and profits thereof.

And as conclusions of law from the foregoing facts, the Court finds:

I.

That there never was any marriage between said Joe Kalyton, and Louise Kalyton, and that if there had been any such marriage as alleged in the Complaint herein, according to the Custom of the Indians of said Cayuse tribe, said marriage would be void.

II.

That said Agnes Kalyton is not the legitimate child of said Joe Kalyton, and is not the or any, heir at law of said Joe Kalyton, and has no interest in or to the lands allotted to him or any part thereof, or the rents, issues or profits thereof.

III.

That the defendant Mary Kalyton is a sister of said Joe
37 Kalyton, and as such is the sole and only heir at law of said Joe Kalyton and the equitable owner of and entitled to the

immediate possession of all of said lands allotted to said Joe Kalyton together with all rents, issues and profits arising therefrom.

IV.

That a decree should be entered herein declaring said defendant Mary Kalyton to be the sole and only heir at law of said Joe Kalyton, deceased, and as such the equitable owner and entitled to the possession of said lands allotted to him, and restraining the plaintiff from interfering with said lands, and declaring that she has no interest therein whatsoever.

W. R. ELLIS,
Circuit Judge.

Dated this 14th day of July 1902.

And afterwards on the 14th day of July, 1902, the same being the 27th Judicial day of the June term, of said court a Decree was entered on the Journal of said Court in words and figures as follows:

(Title of Court and Cause.)

On this day this cause Coming on for a decree upon the Findings of Fact and Conclusions of Law filed herein on July 14th 1902, based upon said Findings of Fact and Conclusions of Law,

It is now therefore hereby Considered, Ordered and Adjudged and Decreed, that the plaintiff Agnes Kalyton, is not the legitimate child of Joe Kalyton, deceased, and is not the or any heir at law of said Joe Kalyton *of said Joe Kalyton* deceased, and has no interest in or to the lands allotted to him or to the rents issues, or
38 profits, thereof, which lands are hereinafter described; and that the defendant Mary Kalyton is a sister of said Joe Kalyton, and as such, is the sole and only heir at law of said Joe Kalyton, deceased, and the equitable owner and entitled to the possession of all of said lands described as lots six and seven, and the North half of the South East quarter of section 31, in township three North of Range thirty four E. W. M. in Umatilla County State of Oregon, containing one hundred fifty seven (157) acres, together with all the rents issues, and profits arising therefrom; and that none of said other defendants above named has any right, title, or interest in or to said lands, or any part thereof or the rents, profits, or issues arising therefrom, and that said plaintiff be and she is, hereby forever restrained and enjoined from in any wise interfering with said lands or any part thereof, or any of the rents issues, or profits thereof, and that the defendant, Mary Kalyton, have and recover of and from Plaintiff her costs and disbursements herein taxed at $——.

(Signed) W. R. ELLIS,
Circuit Judge.

And afterwards on the 12th day of January, 1903, there was filed in the office of the Clerk of said Court, a notice of appeal in words and figures as follows:—

(Title of Court and Cause.)

To Mary Kalyton one of Defendants in the above entitled suit, and to Hon. T. G. Hailey, her attorney, and to Charles Wilkins, as United States Indian Agent, one of defendants above named:

You and each of you will please take notice that Agnes Kalyton, by Louise Kalyton her Guardian *ad litem,* plaintiff in the above entitled suit, hereby appeals to the Supreme Court of the
39 State of Oregon, from the judgment and decree rendered and entered in said suit wherein, Agnes Kalyton by Louise Kalyton her Guardian *ad litem* is plaintiff, and Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glascock and Charles Wilkins as United States Indian Agent are defendants, in the Circuit Court of the State of Oregon for Umatilla County, on the 14th day of July A. D. 1902, in favor of defendant Mary Kalyton, and against Agnes Kalyton, by Louise Kalyton plaintiff, in said suit, which judgment and decree is in substance as follows.

"That the Plaintiff Agnes Kalyton is not the legitimate child of Joe Kalyton, deceased and is not the or any heir at law of said Joe Kalyton deceased, and has no interest in or to the lands allotted to him, or to the rents issues, or profits thereof, which lands are hereinafter described, and that the defendant, Mary Kalyton, is a sister of said Joe Kalyton and as such is the sole and only heir at law, of said Joe Kalyton deceased, and the equitable owner and entitled to the possession of all of said lands, described as lots six and seven, and the North half of the South east quarter of section 31, in township three north of range 34 E. W. M. in Umatilla County State of Oregon, containing one hundred and fifty seven (157) acres together with all the rents, issues and profits arising therefrom, and that none of said other defendants above named has any right, title or interest in or to said land or any part thereof, or the rents profits or issues arising therefrom; and that said Plaintiff be, and she is, hereby forever restrained and enjoined from in anywise interfering with said lands or any part thereof, or any of the rents issues or profits thereof, and that the defendant Mary Kalyton, have and recover of and from plaintiff her costs and disburse-
40 ments herein taxed at $—" and from the whole of said judgment and decree.

Dated this 6th day of January 1903.

AGNES KALYTON,
By LOUISE KALYTON,
Her Guardian ad litem, Plaintiff.
H. J. BEAN,
Attorney for Plaintiff.

STATE OF OREGON, *Umatilla County, ss:*

Due and legal service of the within notice of appeal, is hereby admitted and accepted and a copy thereof received and all other and

further service waived at Umatilla County, Oregon, on this 8th day of January A. D. 1903.

T. G. HAILEY,
Attorney for Mary Kalyton,
One of Defendants Within Named.

STATE OF OREGON, *Umatilla County, ss:*

I Charles Wilkins, one of the defendants in the within entitled suit, as United States Indian Agent hereby admit and accept due and legal service of the within notice of Appeal and acknowledge receipt of a copy thereof, and waive all other and further service at Umatilla County, State of Oregon, on this 8th day of January A. D. 1903.

CHARLES WILKINS,
Formerly United States Indian Agent,
Now United States Indian Supt.

And afterwards on the 13th day of January 1903, there was filed in the office of the Clerk of said Court, an undertaking on appeal in words and figures as follows:

41 (Title of Court and Cause.)

Whereas the above named plaintiff Agnes Kalyton by Louise Kalyton her Guardian *Ad Litem,* is desirous of appealing to the Supreme Court of the State of Oregon, from the judgment and decree rendered and entered in said suit wherein Agnes Kalyton by Louise Kalyton, her Guardian *Ad Litem* is plaintiff and Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glasscock, and Charles Wilkins as United States Indian, — are defendants.

In the Circuit Court of the State of Oregon for Umatilla County, on the 14th day of July 1902 in favor of defendant Mary Kalyton, and against Agnes Kalyton, by Louise Kalyton her Guardian *Ad Litem,* plaintiff in said suit, which judgment and decree is in substance as follows:

"That Plaintiff Agnes Kalyton, is not the legitimate child of Joe Kalyton, deceased, and is not the or any heir at law of said Joe Kalyton, deceased, and has no interest in or to the lands allotted to him, or to the rents, issues, or profits thereof, which lands are hereinafter described, and that the defendant Mary Kalyton is the sister of said Joe Kalyton, deceased, and as such is the sole and only heir at law of said Joe Kalyton, deceased, and the equitable owner and entitled to the possession of all of said lands, described as lots six and seven and the North half of the South East quarter, of section 31 in township three North of Range 34 E. W. M. in Umatilla County, State of Oregon, containing one hundred and fifty-seven (157) acres, together with all the rents issues and profits arising therefrom and that none of said other defendants above named has any right title or interest in or to said lands, or any part thereof, or the rents profits,

or issues arising therefom, and that said Plaintiff be and she
42 is hereby forever restrained and enjoined from in any wise interfering with said lands or any part thereof, or any of the rents issues, or profits thereof, and that the defendant Mary Kalyton have and recover of and from plaintiff her costs and disbursements herein taxed at $—" and from the whole of said judgment and decree.

Now therefore we, Agnes Kalyton by Louise Kalyton, her guardian *Ad Litem,* plaintiff and principal, and R. L. Oliver, surety hereby undertake and promise that the Plaintiff will pay to defendant Mary Kalyton, all the costs damages and disbursements which may be awarded against said plaintiff upon said appeal.

AGNES KALYTON,
By LOUISE KALYTON,
Her Guardian ad litem.
By H. J. BEAN,
Attorney for Plaintiff.
R. L. OLIVER [SEAL.]

STATE OF OREGON, *Umatilla County, ss:*

I, R. L. Oliver, being first duly sworn, say that I am the surety on the foregoing undertaking and that I am a resident and freeholder within the State of Oregon, and that I am worth the sum of two Hundred dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution, and that I am not an attorney or other officer of any Court.

R. L. OLIVER.

Subscribed and sworn to before me this 12th day of January 1903.

H. J. BEAN,
[SEAL.] *Notary Public for Oregon.*

43 STATE OF OREGON, *Umatilla County, ss:*

Due and legal service of the foregoing Undertaking on Appeal is hereby admitted and accepted and a copy thereof received, at Umatilla County State of Oregon, on this 12th day of January 1903.

T. G. HAILEY,
Attorney for Defendant Mary Kalyton.

And afterwards, on the 7th day of February, 1903, there was filed in the office of the Clerk of said Court a motion in words and figures as follows:—

(Title of Court and Cause.)

Comes now the plaintiff above named by H. J. Bean, her Attorney and moves for an order extending the time for filing the transcript in the Supreme Court of the State of Oregon, upon the appeal in the above entitled suit, until the first day of April, 1903, for the reason

that the *such* transcript cannot be prepared within thirty days from taking said appeal.

H. J. BEAN,
Attorney for Plaintiff.

And afterwards on the 7th day of February 1903, the same being the 18th Judicial day of the January Term, of said Court, order was entered on the Journal of said Court in words and figures as follows:—

44 (Title of Court and Cause.)

Now on this day this cause coming on to be heard upon plaintiff's motion for an order extending the time for filing the transcript in the Supreme Court of the State of Oregon, in this cause Plaintiff appearing by H. J. Bean her attorney and the defendant Mary Kalyton appearing by T. G. Hailey Esq., her attorney.

And it appearing to the Court that the transcript in this cause cannot be prepared to file in the Supreme Court within thirty days from the time of taking the appeal herein:

It is therefore hereby ordered and adjudged by the Court that the time for filing the transcript in this suit in the Supreme Court upon the appeal herein, be and the same is hereby extended until the first day of April 1903.

W. R. ELLIS,
Circuit Judge.

Certificate of Transcript.

STATE OF OREGON, *Umatilla County, ss:*

I, W. D. Chamberlain, County Clerk of Umatilla County, State of Oregon, and Exofficio Clerk of the Circuit Court for said County and State do hereby certify that the foregoing transcript of the judgment roll and appeal papers in the case of Agnes Kalyton, by Louise Kalyton, her guardian *ad litem*, plaintiff & appellant *vs.* Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-
45 ta-mop-net, John R. Glasscock, and Charles Wilkins, as United States Indian Agent, defendants and respondents, has been by me compared with the original judgment roll and appeal papers in said case, and that it is a true and correct transcript therefrom, and the whole thereof, including the following papers to-wit: Petition, Order, Oath of Guardian *Ad Litem*, Complaint, Summons, Demurrer, Entry, Order, Motion, Answer, Demurrer, Disclaimer, Reply, Findings of Fact and Conclusions of Law, Decree, Notice of Appeal, Undertaking on Appeal, Motion and Order, as the same appears on file in my office and in my care and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court for said County and State, this 27th day of March 1903.

[SEAL.] W. D. CHAMBERLAIN, *Clerk.*
By B. B. HALL, *Deputy.*

46 AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,
v.
MARY KALYTON ET AL., Respondent-.

Appeal from Umatilla County; Hon. W. R. Ellis, Judge.

Pendleton, Oregon, November Term, 1903.

Henry J. Bean, for Appellant.
T. G. Hailey, for Respondent.
Moore, C. J.
Reversed.

(Endorsed:) Filed Dec. 14 1903. J. J. Murphy, Clerk, By Arthur S. Benson, Deputy.

47 This is a suit by Agnes Kalyton, a minor, by her mother as guardian *ad litem*, to establish her right to certain real property. The transcript shows that about April 21, 1891, Joe Kalyton, an Indian and a member of the Cayuse tribe, was allotted in severalty 157 acres of land in the Umatilla Indian Reservation. He thereafter lived with the plaintiff's mother and died intestate about January, 1899, seised of the real property allotted to him, and after his death the plaintiff was born. The defendant, Mary Kalyton, his sister, claiming to be his sole heir, took possession of the premises in question and secured the rents therefrom. The complaint, after alleging the facts, in substance, as hereinbefore stated, avers that about 1893, plaintiff's mother married Kalyton according to the customs and laws of the tribe to which they belonged; that thereafter they lived and co-habited as husband and wife, and that plaintiff is the issue of such marriage and the sole heir of the deceased. The answer denies the material allegations of the complaint, and for a further defense avers that the alleged marriage was not performed according to law, and therefore void. For a further defense it is averred that Kalyton and plaintiff's mother being allottees of land in severalty were citizens of this state and that he died unmarried and without lineal descendants. A demurrer to the first separate defense having been overruled, a reply was filed putting in issue the averments of new matter in the answer, whereupon a trial was had resulting in a decree that the defendant, Mary Kalyton, was the sole heir of the deceased, and entitled to the real property of which he died seised, and the plaintiff appeals.

MOORE, *C. J.*:

It is contended by plaintiff's counsel that notwithstanding land in the Umatilla Indian Reservation had been allotted in severalty to Joe Kalyton and also to plaintiff's mother, their tribal relations still exist, and as this testimony shows that they were married ac-

cording to the customs and laws of the tribe to which they belonged, the court erred in refusing to grant the relief prayed for. It is maintained by the defendant's counsel, however, that the testimony shows that plaintiff's mother was incompetent to
48 enter into a legal marriage, and this being so, the plaintiff was not born in lawful wedlock, and hence no error was committed as alleged. The Cayuse Indians were recognized as a tribe by the United States, June 9, 1855, when a treaty was concluded with them and other Indians, which was ratified by the Senate, March 8, 1859, and approved by the President, April 11th of that year, setting apart for their exclusive use certain territory in Oregon which has since been known as the Umatilla Indian Reservation: 12 U. S. Stat. L. 945. An act of Congress, approved March 3, 1885, authorized the President of the United States, with the consent of the Indians, to allot to the Cayuse and other Indians, residing upon the Umatilla Reservation, certain areas of land in severalty, and in addition thereto, to reserve a reasonable amount of pasture and timber lands for their use in common, and also a tract for an industrial farm and school, not exceeding in all 120,000 acres. A commission was created to survey the land and make allottment thereof, which, if approved by the Secretary of the Interior, should thereafter constitute the reservation for the Cayuse and other Indians, and within which the allotments were required to be made. The President was also authorized to cause patents to be issued to all allottees, declaring that the United States held the land so allotted for the term of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment was made, or in case of his death, of his heirs, according to the laws of the State of Oregon, and that at the expiration of that period the United States would convey the premises by patent to the allottee or his heirs in fee, discharged of the trust, and free of all charge or incumbrance whatsoever. The law of alienation and descent in force in this state was made applicable thereto after the issuance of the patents, except as therein otherwise provided: 23 U. S. Stat. L. 340. Section six of an act of Congress, approved February 8, 1887, generally known as the "Dawes Act," providing for the allotment of land in severalty to the Indians on the various reservations, is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every
49 member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians

therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." 24 U. S. Stat. L. 390. Section five of an act of Congress, approved February 28, 1891, amending and extending the benefits of the act approved February 8, 1887, is, so far as deemed applicable, as follows: "That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have co-habited together as husband and wife according to the custom and manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child." 26 U. S. Stat. L. 794. These excerpts and quotations from the acts of Congress disclose the policy pursued by the United States in dealing with Indians residing upon reservations to whom land has been allotted in severalty, and though these people have been invested with the rights of citizenship and guaranteed the protection of the laws, and rendered amenable thereto,
50 the object evidently intended to be subserved by such legislation was to encourage them to forsake their primitive ways and to adopt a higher civilization. Reforms of this character are necessarily radical and not cheerfully submitted to or acquiesced in by uneducated Indians. The change from savagery to refinement is slow and results from convincing the ignorant of the superior advantages which the latter state affords. The general government, realizing that the task of persuading the older Indians was difficult, has established schools, to teach their children the English branches and to instruct them in the use of tools and implements, thus rendering them self-supporting and partially qualified to compete with the Caucasian race. It is to the younger Indians then, when removed from the influence of the examples of their parents and from the teachings and traditions of their tribes, during the formation of their characters, and when educated in the schools provided for them, that the government must look, to elevate their race. It is quite probable that this conclusion induced the passage of section five of the act of Congress, approved February 28, 1891 (26 U. S. Stat. L. 794), providing that for the purpose of determining the descent of land to the heir of any deceased Indian, that whenever a male and a female Indian shall have co-habited as husband and wife, according to the custom and manner of Indian life, the issue of such co-habitation shall be deemed their legitimate off-spring. Congress thus recognized the validity of Indian marriages, and though the union may have occurred subsequent to the acceptance of an allot-

ment of land in severalty in an Indian reservation, we believe that if the nuptials were celebrated according to the custom of the tribe of which the parties were members or to which one of them belonged, and in pursuance of such union, they have co-habited as husband and wife, the marriage is valid: Johnson *v.* Johnson, 30 Mo. 72; Earl *v.* Godley, 42 Minn. 361; Bank of Austin *v.* Sharpe, 12 Tex. Civ. App. 223; s. c. 33. S. W. 676. In United States *v.* Rickert, 188 U. S. 432, Mr. Justice Harlan, in speaking of persons residing on a reservation to whom allotments of land in severalty had been made thereon, says: "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been dis-
51 charged from that condition" The allotment of a part of a reservation to Indians in severalty does not terminate their tribal relations nor remove them from the supervision and control of the interior department of the general government: United States *v.* Flournoy Live Stock and Real Estate Co., 71 Fed. 576. To reach any other conclusion might, in some instances, thwart the beneficent purpose of the government and transfer the title of land donated by it to induce the elevation of a race, into another channel never contemplated, for if a marriage entered into by members of a tribe, according to the customs thereof, is to be held invalid, and the issue illegitimate, the offspring could never inherit from the father, whose real property, if he had no collateral kinsmen, following the rule of descent in Oregon, would escheat to the State: Laws Or. 1903, p. 127. In McBean *v.* McBean, 37 Or. 195, Mr. Chief Justice Wolverton, in speaking of the tribal relation of an allottee on the Umatilla Indian Reservation, makes use of the following language: "And it is the adjudged policy of the law to treat the Indian tribes who adhere to their peculiar customs, as separate communities or distinct nationalities, with full and free authority to manage their own domestic affairs, and to pursue their own peculiar habits and customs, especially as it concerns the marriage relation. And this is so although their territory is located within the state lines, and the general government manages their affairs through agencies designated for the purposes." In State *v.* Columbia George, 39 Or. 127, the same justice, in discussing the rights of the Indians on that reservation and the paternal exercise of authority over them, further says: "It would seem, therefore, that citizenship, such as extends within the purview of the Dawes Act to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but with greatly restricted authority, in their primitive government."

Though Indians residing on a reservation to whom land
52 therein has been allotted in severalty are classed as citizens and deemed to be subject to the laws of the state, the federal courts only have jurisdiction of grave crimes committed on the reservation by one such Indian against another: State *v.* Columbia George, *supra.* This is an admission that, notwithstanding the allotment, a *quasi* tribal relation still subsists, and that the general government continues to exercise a paternal care over these wards

of the Nation, and until that guardianship is removed, the state courts should not interfere with or disturb the domestic relations of such Indians; but when these relations are involved, it should be the duty of the state courts to determine whether or not they had been entered into or dissolved in accordance with the customs of the tribe. The principal inquiry, therefore, is whether Joe Kalyton and plaintiff's mother were married according to the customs of the Cayuse Indians. Lee Moorehouse, who had been Indian Agent at the Umatilla Reservation, appearing as plaintiff's witness, testified that he had observed the customs of the Indians on that reservation, was asked: "Can you tell the habits of these Indians in regard to marrying, by the Indian custom?" and, over objection and exception, replied: "There doesn't appear to be any regular form they go through in an Indian marriage, and to get married they simply go to living together, as near as I understand it." This witness further says that when these Indians concluded to marry they entered into the agreement by mutual consent and went to living together; that sometimes the man if he had any property purchased his wife, and that he understood the Indians considered their form of marriage as sacred as any other. In Henry *v.* Taylor, 93 N. W. (So. Dak.) 641, it was held that in order to show a marriage between two Indians according to the Indian custom, consisting of an agreement to live together, followed by co-habitation, it was necessary to show an express agreement and pursuant co-habitation, which contract must be evidenced by words disclosing a meeting of minds, uttered in the present tense, for the purpose of establishing the marriage relation. The plaintiff's mother, testifying by an interpreter, says that she lived with Joe Kalyton as his wife five years immediately
53 prior to his death; that they were not married by any regular custom; that he asked her if she would live with him and she consented; that the young and the old Indians are married in that manner; and that it is an old custom and she could not tell when it commenced. The testimony of this witness is corroborated by that of Joe Allen, who says that Kalyton and plaintiff's mother lived together as other Indian husbands and wives belonging to that tribe. The defendant, Mary Kalyton, testifies that her brother and plaintiff's mother lived together as husband and wife according to the Indian customs, in speaking of which she says she was first married in that manner and lived with her husband one summer, and that they were thereafter married according to the laws of this state. We think the testimony clearly shows a valid and subsisting custom of the Cayuse tribe of Indians in observing which Kalyton and plaintiff's mother entered into an express agreement, evidenced by words disclosing a meeting of their minds, followed by co-habitation, and, under the rule announced, established the existence of a valid marriage.

It is maintained by defendants' counsel, however, that plaintiff's mother was not competent to enter into a marriage contract at the time or after she commenced living with Kalyton and this being so plaintiff's illegitimacy is established and no error was committed in decreeing the real property of which he died seized to his sister as

his sole heir. The testimony shows that plaintiff's mother had lived with the following named Indians as the wife of each respectively, to-wit: Ish-lo-wal-ko, White Wolf and Top-la-won. The transcript does not show whether or not the first named person is dead, but it discloses that the others were living during all the time she lived with Kalyton, Top-la-won having re-married. The plaintiff's mother testifies that she was married to these persons in the Indian manner and that she ceased to live with and separated from each according to the custom of her tribe. The following question was propounded to the interpreter: "Ask her if she separated or was divorced from White Wolf and these other Indians according to Indian custom, the same as Indians always separated?" and she answered through
54 him as follows: "Yes, sir; separated in the Indian way." No evidence was offered, tending to show how an Indian divorce is secured, and it is argued by defendants' counsel that the testimony of plaintiff's mother is the mere statement of a legal conclusion and insufficient to establish the probative facts of the dissolution of the marital relation according to the Indian custom. The legal principle insisted upon would ordinarily be sufficient to defeat the plaintiff's right of recovery, but in the present instance we do not think the rule invoked applicable, for in settling the pleadings the court having held that after the allotment of land in severalty a marriage according to law was a prerequisite to the legitimacy of the issue of co-habitation, the subordinate question of the capacity of plaintiff's mother to enter into a marriage contract with Kalyton was not given that degree of attention which its importance demanded. No objection was interposed to the questions propounded to her in relation to her separation from her prior husbands nor was she cross-examined as to the customs of her tribe in the manner of securing divorces, in view of which we believe the testimony was sufficient to show that she was divorced from them and was capable of entering into a valid marriage with Kalyton.

It is contended by defendants' counsel that the plaintiff was not born within the period of gestation after the death of Kalyton and hence no error was committed in rendering the decree complained of. The testimony shows that Kalyton died, as plaintiff's mother testified, a "few days" after the New Year, and that her daughter was born, "late in the fall; the time the leaves fall off the trees"; that the witness did not know the name of the months but that plaintiff was born about one month before Christmas, and at the trial her age was "four snows." When it is considered that the knowledge of plaintiff's mother concerning the year seems to be limited to the holidays and that a "few days" or "one month" are to her vague and indefinite terms, we beli-ve her testimony that Kalyton was the father of her daughter to be true without discussing the question of how long gestation might be protracted. No testimony having been
55 offered tending to show that plaintiff's mother was dissolute, we conclude that her daughter, the plaintiff herein, was born in lawful wedlock and is the sole heir of Joe Kalyton, deceased, and as such, entitled to the possession of the real property of which he died seised.

The decree will therefore be reversed and one entered here in accordance with this opinion.

56 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court-room in the City of Salem, on the first Monday, the 5th day of October 1903,

Present: Hon. Frank A. Moore, Chief Justice, Hon. Charles E. Wolverton, Associate Justice, Hon. Robert S. Bean, Associate Justice, and J. J. Murphy, Clerk, the following proceedings were had on Monday the 14th day of December 1903, the same being the 35th judicial day of said term:

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,

vs.

MARY KALYTON, Respondent.

Appeal from Umatilla County.

This cause having heretofore to-wit: on the 5th day of November 1903, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon, and being now fully advised in the premises finds that there is error as alleged. It is therefore Considered, Ordered and Decreed that the decree in this cause in the court below rendered be and the same hereby is in all things reversed and set aside.

And it appearing to the court and the court further finds: That on or about the — day of January 1898, Joe Kalyton died intestate in Umatilla County State of Oregon, seized and possessed of the following described real estate, to-wit: Lot six (6) and seven (7) and the North half of the Southeast quarter of Section Thirty one (31) in Township Three (3), North of Range Thirty four (34)

57 East of the Willamette Meridian, in Umatilla County, State of Oregon, being a part of the Umatilla Indian Reservation, and containing One hundred and fifty seven (157) acres, which lands were duly allotted to Joe Kalyton on or about the 21st day of April 1891 by the Government of the United States of America, under and by virtue of the provisions of an Act of Congress entitled, "An Act providing for the allottment of land in severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes," which said Act was approved March 3, 1885, and the amendments thereto, which said allottment was duly approved by the Department of the Interior of the United States of America on the 21st day of April 1893.

That on or about the year 1893, said Joe Kalyton and Louise Kalyton were duly married at the Umatilla Indian Reservation in accordance with the customs and laws of the Cayuse tribe of Indians of which they were members, and residing on said Umatilla Indian

Reservation, and thereafter lived and cohabited together as husband and wife for a period of about five years, and that said Agnes Kalyton is the only and lawful issue of said marriage and cohabitation, and is the sole heir at law of said Joe Kalyton, deceased.

That said appellant Agnes Kalyton, is entitled to have all of said land of said Joe Kalyton, deceased, descend to her, and is entitled to have the immediate possession, and the present use and the rents, issues and profits thereof.

It is now therefore further considered, ordered and decreed that the appellant Agnes Kalyton be and she is hereby declared to be the legal, sole and only heir at law of said Joe Kalyton deceased,
58 and as such is the owner of and entitled to the possession of the Lots six (6) and seven (7) and the North half of the Southeast quarter of section thirty one (31) in Township Three (3) North, of Range Thirty four (34) East of the Willamette Meridian, in Umatilla county, State of Oregon, which said lands were allotted to said Joe Kalyton under and by virtue of an Act of Congress entitled "An Act providing for the Allotment of lands in severalty to the Indians residing on the Umatilla Reservation in the State of Oregon, and granting patents therefor, and for other purposes;" which said Act was approved March 3d 1885, and the amendments thereto; and is entitled to all the rents, issues, and profits thereof, and that said Respondent Mary Kalyton has no right, title or interest in or claim to or upon said lands, or any part thereof.

It is further considered, ordered and decreed that the appellant recover of respondent her costs and disbursements in this court upon the appeal allowed and taxed at $98.90 and her costs and disbursements in the court below to be there taxed.

It is further ordered that the cause be remanded to the said court below and that a decree be there entered and docketed in accordance herewith.

59 AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,

vs.

MARY KALYTON ET AL., Respondents.

Reversed, December 14, 1903, (74 Pac. 491).

On Petition for Rehearing.

Moore, C. J.
Denied.

(Endorsed:) Filed Oct. 17, 1904, J. J. Murphy, Clerk, By Arthur S. Benson, Deputy.

60 MOORE, *C. J.*:

A petition for a rehearing having been filed, it is contended that this suit was instituted to determine, in effect, the title and right to the possession of public land, thereby necessarily rendering the

United States a party; but that this cannot be done by a state court, and hence the decree rendered herein is *coram non judice* and void. The legal principle now insisted upon was not discussed by counsel at the trial in this court, but as jurisdiction of subject-matter cannot be conferred by consent, is never waived, (B. & C. Comp., §72), and may be invoked for the first time on appeal, (Evarts *v.* Steger, 5 Or. 147), it becomes necessary to consider the question presented.

The act of Congress, approved March 3, 1885, (23 Stat. 340) providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in this State and prescribing the quantity to be distributed to each person of the various classes, contains the following clause: "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided."

An examination of the language quoted will show that though
61 the issuance of two patents is contemplated, it is evident that the first specified in the act was intended to be nothing more than a certificate or written memorandum, to evidence the selection of the land allotted and to declare the trust reserved: United States *v.* Rickert, 188 U. S. 432. In our opinion the word "descent" in the clause stipulating "that the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed," etc., was intended to render the transmission of an estate by inheritance applicable to the land allotted to an Indian from the time such certificate was issued. The word "alienation" usually means the act by which the title to real property is voluntarily transferred by one person to, and accepted by another, and such act is generally accomplished by the execution of a deed or of a will: Burbank *v.* Rockingham etc. Ins. Co., 24 N. H. 550. As an Indian cannot voluntarily transfer the title to the land allotted to him, until the final patent is issued, it is evident that the word alienation was not used in the act under consideration in its technical sense. It is quite probable, however, that until the title is transferred, an Indian allottee has no estate in the premises, and that his heirs take as donees of the United States and not by inheritance from him. The act having provided that after the expiration of twenty-five years from the time of the allotment "the United States will convey the premises by patent" to the allottee or his heirs, "in fee," etc., the final patent when issued will invest the allottee with an estate in the land that he can "alienate" or "devise," and as these quoted words were not necessary in the grant of a fee, they, in our opinion, are limited

to the first patent issued. The law of descent of this state being applicable on the death of an Indian allottee,
62 after the primary patent or certificate is issued, has a state court jurisdiction of the subject-matter, and is its decree, determining the heirs in such cases, valid? So long as the United States holds the lands in trust for Indian allottees, the title thereto remains in the general government, (United States *v.* Rickert, 188 U. S. 432), and the question as to whether or not a final patent therefor shall issue, is to be determined by the Secretary of the Interior, thereby depriving state courts of all jurisdiction of the subject-matter; Musgrove *v.* Harper, 33 Or. 252; Moore *v.* Robbins, 96 U. S. 530; United States *v.* Schurz, 102 U. S. 378. If this were a suit to enforce the trust reserved, the United States would be an indispensable party (31 U. S. Stat. 760, c. 217; Pomeroy, Remedies, § 356; Tucker *v.* Silver, 9 Iowa 261; Hy-yu-tse-mil-kin *v.* Smith, 194 U. S. 401) and as this cannot be done by a state court, the decree rendered herein would be void. The determination by a state court of the heirs of a deceased Indian allottee is not, in our opinion, an execution of the trust: Bird *v.* Winyer, 24 Wash. 269; Bird *v.* Terry, 129 Fed. 472. The finding of such fact is not an interference with the primary disposal of the soil but is in aid of the general government in protecting the rights of its *cestui que trust.* Thus, in Kitcherside *v.* Myers, 10 Or. 21, it was held that where a person had taken the initiatory steps to secure the title to public land and received from the proper officers the necessary evidence thereof, he was entitled to the possession of the premises selected and for any interference therewith by another without legal title or equal equitable claim, a state court, upon application of the entryman, would put him in possession of his rights. The rule is settled in this state that a person entitled to the possession of land the title to which
63 is in the United States, will be protected in his right by our courts, when his possession has been unlawfully disturbed by another: Jackson *v.* Jackson, 17 Or. 110; Hindman *v.* Rizor 21 Or. 112; Allen *v.* Dunlap, 24 Or. 229; Bishop *v.* Baisley 28 Or. 119; Pacific Live Stock Co. *v.* Gentry, 38 Or. 275; Browning *v.* Lewis, 39 Or. 11; Moore *v.* Halliday, 43 Or. 243. In the case at bar, Joe Kalyton was entitled, during his lifetime, to the possession of the land allotted to him and upon his death, his heirs, under the law of descent in this state, succeeded to his right in the premises. This possession having been disturbed by one who is not his successor in interest or estate, according to such law, the rule established in this state makes it incumbent upon our courts, in aid of the beneficent policy adopted and pursued by the general government in caring for the Indians and in trying to promote their civilization, to declare by solemn decree who is his legal heir.

It is argued, however, that unless the Indian Agent in charge of the Umatilla Reservation voluntarily surrenders to the plaintiff the possession of the premises allotted to the deceased, it will be impossible to enforce the decree herein. It is the duty of the court to declare the law involved in causes submitted irrespective of the consequences that may result therefrom, and having faithfully discharged that

obligation according to law, as we understand it, we are compelled to adhere to the opinion heretofore announced, leaving the enforcement of the decree to the person in whose favor it was rendered.

It follows that the petition should be denied, and it is so ordered.

64 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 2nd day of October 1905 Present: Hon. Robert S. Bean, Chief Justice, Hon. Frank A. Moore, Associate Justice, Hon. Thomas G. Hailey, Associate Justice, and J. J. Murphy, Clerk, the following proceedings were had on Friday the 8th day of December 1905, the same being the 28th judicial day of said term:

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Appellant,

vs.

MARY KALYTON, Respondent.

Appeal from Umatilla County.

It appearing to the court from the affidavit of R. J. Slater attorney for the said respondent Mary Kalyton, that since this cause was decided herein upon appeal the said Mary Kalyton died leaving surviving her as her only and sole heir at law one Wm. McKay who is now the only and real party in interest as defendant and respondent herein.

It is now ordered by the court upon motion of the said R. J. Slater that the said William McKay be and he is hereby appointed and substituted in the place and stead of said Mary Kalyton as defendant and respondent in this cause.

65 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Specifications of Error.

Now comes the above named defendants and files herewith their Petition for a Writ of Error and say that there are Errors, in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of Errors:

1. The Supreme Court of the State of Oregon, erred in holding and deciding that the marriage between Joe Kalyton and Plaintiff's

(Defendant in Error) mother according to the customs of the Cayuse Indians which was consummated after the Act of Congress of February 8th 1887, commonly called the "Daw-s Act" (24 Stat. U. S. 390, c. 119, Sec. 6, 3rd Fed. St. Ann. 496), was a lawful union under the Act of Congress of February 28th, 1891.

2. In holding and deciding that the Courts of the State of Oregon had jurisdiction of the subject matter of this suit and in not holding that the United States Circuit Court for the District of Oregon, had exclusive jurisdiction thereof.

3. In holding and deciding that the United States Government as Trustee for said defendants is not an indispensable party to this suit.

R. J. SLATER,
Attorney for Defendants, Plaintiffs in Error.

(Endorsed:) In the Supreme Court of the State of Oregon, October Term 1905. Agnes Kalyton by her guardian *ad litem* Louise Kalyton, Plaintiff, *vs.* William McKay *et al.*, Defendants. Specifications of Error; Filed Dec. 8, 1905, J. J Murphy, Clerk; By Arthur S. Benson, Deputy.

66 In the Supreme Court of the State of Oregon.

AGNES KALYTON, — LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, Mrs. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Prayer for Relief.

For the errors assigned the defendants pray the Judgment and decree of the Supreme Court of the State of Oregon in the above entitled cause be reversed, and a judgment and decree for the defendant and for costs.

R. J. SLATER,
Attorney for Defendants.

(Endorsed:) In the Supreme Court of the State of Oregon; Agnes Kalyton &c. Plaintiff, *vs.* William McKay *et al.* Defendants, Prayer for Relief; Filed December 26th 1905, J. J. Murphy, Clerk; By Arthur S. Benson, Deputy. R. J. Slater, Attorney for Def'ts.

67 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Petition for Writ of Error.

To the Honorable Robert S. Bean, Chief Justice of the Supreme Court of Oregon:—

The defendants in the above entitled suit, most respectfully represent and say:

That on the 14th day of December 1903, a final decree and judgment in this suit was entered by the Supreme Court of the State of Oregon, said decree and judgment being against the defendants and in favor of the above named plaintiff by which said decree and judgment these said defendants were aggrieved in that said judgment and decree and the proceedings had there*to* in this case certain errors were committed to the prejudice of these defendants, all of which errors will appear more in detail from the Assignment of Errors filed with this Petition.

Wherefore defendants pray that a Writ of Error may issue to the United States Supreme Court, directed to the Supreme Court of the State of Oregon, for the Errors complained of, and that a duly authenticated transcript of the proceedings herein be sent to the said Supreme Court of the United States.

R. J. STATER,
Attorney for Defendants.

68 STATE OF OREGON, *Supreme Court, ss:*

Let the Writ of Error issue upon the execution of a Bond by William McKay with sufficient sureties in the sum of One Thousand Dollars ($1,000.00) said bond when approved to act as a supercede-s.

Dated this 8th day of December A. D. 1905.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

69 [Endorsed:] No. —. In the Supreme Court of the State of Oregon October Term, 1905 Agnes Kalyton, by Louise Kalyton her guardian, *ad litem* Plaintiff *vs.* William McKay *et al.* Defendants Petition for Writ of Error. Filed Dec. 8 1905 J. J. Murphy, Clerk; By Arthur S. Benson, Deputy.

70 In the Circuit Court of the State of Oregon for Umatilla County.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, Mrs. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Bond on Writ of Error.

Know all men by these presence: That we, William McKay, as principal and William Caldwell as surety are held and firmly bound in the sum of $1000. unto the above named plaintiff, her heirs, administrators and executors, to be paid to the said plaintiff, her heirs, administrators or executors, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our *selas* and dated this 2" day of December 1905.—

Whereas: The above named William McKay has sued out a Writ of Error to the Supreme Court of the United States, to reverse the decree in the above entitled cause by the Supreme Court of the State of Oregon.—

Now therefore, the condition is such, that if the above named William McKay shall prosecute said writ to affect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

WILLIAM McKAY.
WILLIAM CALDWELL.

71 STATE OF OREGON, *Umatilla County, ss:*

I, William Caldwell, being first duly sworn say: That I am the surety above named; and that I am a resident householder and freeholder within the State of Oregon, and am worth the sum of $2000 over and above all my just debts and liabilities and exclusive of property exempt from execution.

In witness whereof, I have hereunto set my hand this 4th day of December 1905.

WILLIAM CALDWELL.

Subscribed and sworn to before me this 4th day of December 1905.
[SEAL.] DAN P. SMYTHE,
Notary Public for Oregon.

STATE OF OREGON, *Umatilla County, ss:*

I, Robert J. Slater being first duly sworn on my oath, say: That I have made a diligent search and inquiry concerning the amount

of property real and personal and its value owned by William Caldwell the person whose name is subscribed to the foregoing undertaking and bond, and as a result of such investigation, believe him to be safely worth the sum of $2000, over and above all just debts and exclusive of property exempt from execution.

R. J. SLATER.

Subscribed and sworn to before me this 8th day of Dec. 1905.

[SEAL.] ARTHUR S. BENSON,
Notary Public for Oregon.

72 STATE OF OREGON, *Supreme Court, ss:*

The foregoing bond was submitted to and approved by me this 8th day of December A. D. 1905.

R. S. BEAN,
Chief Justice.

(Endorsed:) In the Supreme Court of the State of Oregon, October Term 1905; Agnes Kalyton by Louise Kalyton her guardian *ad litem*, Plaintiff, *vs.* Mary Kalyton, *et al.* Defendants; Bond. Filed Dec. 8, 1905, J. J. Murphy, Clerk; By Arthur S. Benson, Deputy.

73 In the Supreme Court of the United States.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY, Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oregon, before the Honorables Charles E. Wolverton, Robert S. Bean, and Frank A. Moore, between Agnes Kalyton, by Louise Kalyton her guardian *ad litem* Plaintiff and Defendant in Error, and William McKay, substituted for Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glasscock, and Chas. Wilkins as United States Indian Agent, Defendants and Plaintiffs in Error, a manifest error hath happened to the great damage of said Plaintiffs in Error, as by — complaint doth appear, and We being willing that error, if any

hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, *and* in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 9th day of December, A. D. 1905.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the United States Circuit Court
for the District of Oregon.

Allowed.
R. S. BEAN,
Chief Justice of the Supreme Court
of the State of Oregon.

74 [Endorsed:] No. —. In the Circuit Court of the United States for the District of Oregon. Agnes Kalyton *vs.* William McKay *et al.* Writ of Error to the Supreme Court of the United States. Filed Dec. 11, 1905. J. J. Murphy, Clerk.

75 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON Her Guardian *ad Litem*, Plaintiff,

vs.

WILLIAM MCKAY Substituted for MARY KALYTON, PETE KALYTON, LITTLE PETE KALYTON, MRS. IDA CATON, AL-ON-TA-MOP-NET, JOHN R. GLASSCOCK, and CHAS. WILKINS, as United States Indian Agent, Defendants.

Citation.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

To Agnes Kalyton, by Louise Kalyton her guardian *ad litem* and H. J. Bean her Attorney, The President of the United States send Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States to be held at Washington, within sixty days from the date hereof pursuant to a Writ

of Error filed in the Clerk's Office of the Supreme Court of the State of Oregon, wherein Mary Kalyton, Pete Kalyton, Little Pete Kalyton, Mrs. Ida Caton, Al-on-ta-mop-net, John R. Glascock, and Chas. Wilkins as United States Indian Agent and William McKay substituted defendant for Mary Kalyton deceased, are Plaintiffs in Error and Agnes Kalyton by Louise Kalyton her guardian *ad litem* are Defendants in Error, to show cause if any there be why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oregon, this 12th day of December, 1905.

[Seal Supreme Court, State of Oregon.]

R. A. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

76 PENDLETON, UMATILLA COUNTY, OREGON,
December 14th, 1905.

I, Attorney of Record for Defendant in Error in the above entitled suit, hereby acknowledge due service of the above Citation and enter an appearance in the Supreme Court of the United States.

H. J. BEAN,
Attorney for Defendants in Error.

[Endorsed:] No. ——. In the Supreme Court of the State of Oregon. October Term, 1905. Agnes Kalyton, by Louise Kalyton her guardian *ad litem*, Plaintiff, *vs.* William McKay *et al.*, Defendants. Citation. Filed Dec. 16th, 1905. J. J. Murphy, Clerk.

78 In the Supreme Court of the State of Oregon.

AGNES KALYTON, by LOUISE KALYTON, Her Guardian *ad Litem*,
Plaintiff,
vs.
WILLIAM MCKAY, Substituted for MARY KALYTON Deceased *et al.*,
Defendants.

I, J. J. Murphy, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said suit filed with our said Court on appeal from the decree of the circuit court of the State of Oregon for the County of Umatilla from which the said appeal was taken, and is the record upon which said appeal was heard, and the decree of the supreme court entered thereon on the 14th day of December 1903.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the decree of our said Supreme Court upon the said appeal entered on the said 14th day of December 1903,

and a full, true and correct copy of the opinion of the court filed on said 14th day of December 1903, and upon which said decree was entered. Also a full, true and correct copy of the opinion of the court denying the Respondent's Petition for a Rehearing, filed October 17, 1904, a correct copy of the order of said court substituting Wm. McKay as defendant herein.

I further certify that the Petition for a Writ of Error in said cause and the endorsement thereon; the Writ of Error and Allow-
79 ance thereof and the endorsements, and the Citation with acceptance of service and endorsements thereon, all of which are attached to the above and foregoing, are the original Petition, Writ of Error and Citation lodged and filed with me; and I do certify that the foregoing copy of bond, its approval and endorsements thereon, prayer for relief and endorsements thereon, and the specification of errors are true and correct copies of such originals lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said Court as the same appears of record and on filed in my office.

I further certify that the cost of the foregoing return to the Writ of Error is $27.00 and that said amount was paid by R. J. Slater Attorney for Plaintiffs in Error.

In witness whereof, I have hereunto set my hand and seal of the Supreme Court of the State of Oregon, at my office in the City of Salem, in said State this 4th day of January 1906.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

Return to Writ.

UNITED STATES OF AMERICA, *Supreme Court of Oregon, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the above entitled cause, with all things concerning the same.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court
of the State of Oregon.

Endorsed on cover: File No. 20,045. Oregon supreme court. Term No. 181. William McKay (substituted for Mary Kalyton) *et al.*, plaintiffs in error, *vs.* Agnes Kalyton, by Louise Kalyton, her guardian *ad litem*. Filed January 12th, 1906. File No. 20,045.